Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area	)	CC Docket No. 04-223

COMMENTS OF McLEODUSA TELECOMMUNICATIONS SERVICES, INC.

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SUMMARY

Qwest has filed a petition requesting the Commission to (i) forbear from the obligations imposed by Section 251(c) and Section 271 because allegedly Qwest is no longer dominant in the Omaha MSA; and (ii) eliminate regulation of Qwest as a dominant carrier and as the ILEC in the Omaha MSA. Qwest's Petition should be rejected for a number of reasons. First, Qwest remains dominant in the Omaha MSA, especially in the market for provision of wholesale access to end user customers. However, even if Qwest were non-dominant in the market, non-dominance is not the appropriate standard under Sections 251(c) and 271, which contain specific standards that Qwest has failed to meet.

Second, Qwest in essence is requesting the Commission to change the terms of Section 271 checklist, which the Commission may not do under the specific language of Section 271(d)(4). For this reason alone Qwest's Petition should be dismissed.

Third, Qwest goes out of its way to twist the facts about the level of effective competition in the Omaha MSA. Qwest dwells on issues related to the retail market, such as intermodal competition, deployment of switches, provision of services through VoIP, etc., while at the same time avoiding the fundamental question, that Qwest is dominant in the provision of wholesale loops and transport in the Omaha MSA and that there are no alternatives for CLECs other than Qwest's ubiquitous network.

Fourth, Qwest has failed to meet the standards of Section 10. Under its Section 10 analysis, the Commission has required a much more mature development of competition in a market than what is evidenced nowadays in the local exchange market in the Omaha MSA. Section 10(d) precludes any forbearance from any Section 251(c) and 271 provisions until the

requirements of Section 251(c) and 271 are "fully implemented." Contrary to Qwest's assertion, Sections 251(c) and 271 cannot be deemed "fully implemented" at this point in time. Qwest still remains dominant in the Omaha MSA, in particular with respect to wholesale services and the Omaha MSA must be fully opened to competition before the Commission can even begin to consider deregulation. For these reasons, the Commission should summarily dismiss Qwest's Petition.

TABLE OF CONTENTS

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McLeodUSA Telecommunications Services, Inc. ("McLeod USA"), through undersigned counsel, submits these comments in response to the June 25, 2004 Public Notice seeking comment on the Petition for Forbearance in the Omaha, Nebraska Metropolitan Statistical Area ("MSA") filed by Qwest Corporation.[1] In its Petition,[2] Qwest requests the Commission to forbear from the obligations imposed by Section 251(c) and Section 271 because allegedly Qwest is no longer dominant in the Omaha MSA. Moreover, Qwest asks the Commission to eliminate regulation of Qwest as a dominant carrier and as the incumbent local exchange carrier ("ILEC") in the Omaha MSA. For the reasons stated below, the Commission should deny Qwest's Petition.

I. NON-DOMINANCE IS NOT THE TEST FOR APPLICATION OF SECTION 251 AND 271 OBLIGATIONS

For the reasons stated elsewhere in these comments, Qwest remains dominant in the Omaha MSA, especially in the market for provision of wholesale access to end user customers.

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1 CC Docket No. 04-223, *Commission Establishes Comment Cycle for Qwest's Petition for Forbearance in the Omaha Metropolitan Statistical Area*, Public Notice, DA 04-1869 (June 25, 2003).

2 Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, CC Docket No. 04-223, (filed June 21, 2004) (the "Petition").

Indeed, it is essentially the only provider of wholesale access service to the vast majority of end user customers in the Omaha MSA. However, even if Qwest were non-dominant, that does not govern application of Section 251(c) and 271 obligations which are subject to specific, different statutory standards.

In particular, under Section 251(d)(2), ILECs need to provide competitors with access to bottleneck facilities that are necessary for the competitor to provide services and the failure to receive such access would impair the ability of that competitor to provide telecommunications services. In turn, Section 271 imposes independent and additional obligations on RBOCs that go beyond the general requirements imposed on ILECs via Section 251. Contrary to Qwest's contention, the statute does not authorize the Commission to forbear from imposing these unbundling obligations simply because the RBOC is facing competition or loosing market share in the retail market. Qwest needs to demonstrate that the standard of "necessary and impair" is no longer met and Qwest's Petition fails to demonstrate this fact.

Because incumbents like Qwest control access to customers, they possess market power in provision of a host of services, most notably wholesale access to end user customers and have the ability, absent regulation, to harm competitors by denying reasonable and nondiscriminatory access to loops and other bottleneck facilities. For this reason alone, the Commission must deny Qwest's request for forbearance from application of Sections 251(c) and 271 obligations and require that it continue providing nondiscriminatory access to its bottleneck facilities.

II. THE COMMISSION MAY NOT ALTER THE TERMS OF SECTION 271 CHECKLIST

Grant of Qwest's Petition would be tantamount to altering the terms of the Section 271 competitive checklist for the Omaha MSA. Section 271(d)(4) explicitly proscribes

the Commission from altering this checklist. Section 271(d)(4) states that the Commission "may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)."[3] This provision concerning the competitive checklist trumps the more general provisions of Section 10 of the Act regarding the Commission's forbearance authority.[4] The Commission may not use forbearance to limit the terms of Section 271's checklist as requested by Qwest in its Petition.

Qwest's Petition would create the potential for elimination of numerous elements of the checklist in the Omaha MSA, including loops, transport and switching. Section 271(d)(4) ensures that as long as an RBOC offers in-region interLATA services it must comply with an unchangeable list of network access. For this reason alone, the Commission should dismiss Qwest's Petition.

Contrary to Qwest's allegations, the RBOCs' bottleneck control over last mile facilities further delays the introduction of full competition into the local exchange market. The U.S. Supreme Court chronicled how control over the local exchange gives ILECs a nearly insurmountable advantage:

> A local exchange is thus a transportation network for communications signals, radiating like a root system from a "central office" (or several offices for larger areas) to individual telephones, faxes, and the like. It is easy to see why a company that owns a local exchange (what the Act calls an "incumbent local exchange carrier," 47 U.S.C. § 251(h)), would have an almost insurmountable competitive advantage not only in routing calls within the exchange, but, through its control of this local market, in the markets for terminal equipment and long-distance calling as well. A newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network, the most costly and difficult part of which would be laying down the "last mile" of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses.

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3 47 U.S.C. § 271(d)(4).

4 *See e.g., Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524-26 (1989) (specific statutory provision trumps a more general one).

> The incumbent company . . . could place conditions or fees (called "access charges") on long-distance carriers seeking to connect with its network. In an unregulated world, another telecommunications carrier would be forced to comply with these conditions, or it could never reach the customers of a local exchange.[5]

Thus, checklist obligations will need to be in place for a long while to ensure that CLECs are able to overcome the "nearly insurmountable" advantages that ILECs, such as Qwest, possess and to ensure markets are truly opened to competition.

III. QWEST REMAINS DOMINANT IN THE OMAHA MSA.

A. Relevant Market for UNEs is Wholesale Provision of Loops and Transport.

In its Petition, Qwest goes out of its way to try to convince the Commission that Qwest has lost significant market share in the retail market of the Omaha MSA and that as such, the Commission should forbear from applying the requirements of Section 251(c) and certain requirements from Section 271 of the 1996 Act. However, Qwest fumbles at determining the relevant product market[6] and is silent on the wholesale market where Qwest is dominant not only in the Omaha MSA, but throughout its 14-state service territory, including the wholesale provision of loops and transport specifically governed by Sections 251(c) and 271. In order for the Commission to even begin considering forbearance from the requirements of Sections 251(c) and 271, Qwest needs to demonstrate that it is no longer dominant in the wholesale market of loops and transport. Qwest simply ignores these issues and instead goes on for 40 pages plus of additional exhibits, providing self-serving statistics about Qwest's market share in the retail market. Nothing in the Petition demonstrates that Qwest is not dominant with respect to provision of wholesale loops and transport and as such the Commission should deny the Petition, although Quest is dominant in the retail market as well.

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5 *Verizon Communications, Inc. v. FCC,* 122 S.Ct. 1646, 1661-1662 (May 13, 2002).

B. Duopoly is not enough for non-dominance.

The unstated theme of Qwest's Petition is that there is a duopoly in the Omaha MAS, where Cox Cable, by Qwest's admission its "most aggressive competitor in the Omaha MSA,"[7] has obtained a significant market share in the provision of local services in this MSA. In applying its forbearance power under Section 10(a), the Commission has heretofore required the development of a much more significant amount of competition than that which the local exchange market in the Omaha MSA currently exhibits. For instance, in determining whether to forbear from the requirements of Sections 201 and 202 of the Act for broadband PCS providers, the Commission clearly suggested that duopoly market power would not be sufficient to support forbearance.[8] The Commission noted that even though the CMRS market was progressing from duopoly market power, it was still not enough for forbearance. The Commission found that:

> Nonetheless, the competitive development of the industry in which broadband PCS providers operate is not yet complete and continues to require monitoring. The most recent evidence indicates that prices for mobile telephone service have been falling, especially in geographic markets where broadband PCS has been launched. These price declines, however, have been uneven, and do not necessarily indicate that prices have reached the levels they would ultimately attain in a competitive marketplace. . . . Furthermore, even if a licensee is providing service in part of its licensed service area, there may be large areas left without competitive service.[9]

The Commission found "that current market conditions alone will not adequately constrain unjust and unreasonable or unjustly and unreasonably discriminatory rates and practices" and,

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6 Teitzel Affidavit at 6.

7 Teitztel Affidavit at 8.

8 *In the Matter of Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, WT Docket No. 98-100, GN Docket No. 94-33, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶ 21 (1998) ("Until a few years ago, licensed cellular providers enjoyed duopoly market power, substantially free of direct competition from any other source.")

9 *Id.* at ¶ 22.

therefore, concluded that the first prong of the Section 10 forbearance standard had not been satisfied.[10]

In the local exchange market, competitive market conditions are much less developed than the CMRS market. In the residential mass market, even taking Qwest statistics at face value, there remains monopoly market power because most CLECs require the use of Qwest's bottleneck facilities to provide services. The Omaha MSA still has an enormous way to go in regard to competition before the Commission should even begin to consider forbearance.

C. CLECs Switch Capacity Irrelevant

One of the multiple superfluous and irrelevant facts that Qwest provides in support of its Petition, is the issue of deployment of switches by CLECs and the capacity associated therewith.[11] Qwest dwells on switches in an effort to shift the Commission's attention from the main issue at hand – Qwest's control over bottleneck facilities necessary for CLECs to provide service to their customers. The fact that CLECs have deployed high capacity switches in the Omaha MSA simply demonstrates that CLECs have made significant investments in this market and are in a better position to compete with the incumbent than by simply reselling its services. However, the fact that the switches have been deployed does not, in any way, demonstrate that CLECs have deployed alternative "facilities" to those that are actually controlled by Qwest and that are necessary to get access to end users.

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10 *Id.* at ¶ 24.

11 Qwest Petition at 13.

D. Intermodal Competition is not Sufficient to Grant the Relief Sought by Qwest

1. Wireless

Qwest contends that numerous CMRS providers compete in the Omaha MSA and that such wireless providers will erode the wireline telephone base as many consumers will be willing to "cut the cord" and use their wireless phone as their only telephone.[12] McLeod USA submits that while CMRS carriers provide an important service by allowing people to stay connected while on the road, these services are not yet a substitute for traditional wireline services because there are still significant issues with quality as coverage is spotty and even non-existent in certain areas. For example, virtually no consumer that has had the unfortunate experience of taking a long conference call on a cell phone would be willing to do it routinely if they can have access to a wireline that does not generate the amount of "static" and "noise" usually associated with wireless calls. Moreover, consumers would not be so willing to "cut the cord" as suggested by Qwest, while ILECs, including Qwest, are vigorously resisting number portability between wireline and wireless phones.

2. VoIP

Qwest also claims that it is facing significant competition from companies that provide voice over Internet protocol ("VoIP") over broadband facilities.[13] Contrary to Qwest's contention, VoIP is not a substitute for traditional wireline voice services. This technology is still in a nascent state and is far away from representing a substitute for wireline circuit switched telephone services. While a number of VoIP companies have surfaced in past few years, these companies have only managed to capture a limited number of subscribers. Moreover, VoIP providers are still facing issues with quality of calls and there is significant latency in the

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[12] Petition at 11 and Teitzel Affidavit at 24.

majority of VoIP communications. Finally, VoIP requires the consumer to have access to a broadband connection (in a number of cases provided by Qwest itself through its DSL service) thus further complicating the consumer's access to this technology.

At most, VoIP will (in a few years) become a substitute for second telephone lines, but based on its current levels of penetration, quality and customer acceptance, this technology is not bound to become a substitute for traditional wireline voice services.

E. Qwest's Network has not been Overbuilt by Competitors and Qwest is Still the Only Provider of Key Facilities

Contrary to Qwest's contention,[14] Qwest's network has not been overbuilt by several competitors and Qwest is still the sole provider of bottleneck loops and transport in the Omaha MSA. A number of the CLEC competitors cited by Qwest, including McLeod USA, have been able to enter the Omaha market solely because of the legal obligations imposed by Sections 251 and 271 requiring Qwest to provide nondiscriminatory access to its bottleneck facilities. There are no readily available alternatives to Qwest's ubiquitous network in the Omaha MSA and no competitor has overbuilt Qwest's network so as to allow CLECs to choose providers for these necessary facilities. Thus, even assuming that Qwest's market share for retail services has effectively shrunk, Qwest has not provided the Commission with sufficient credible evidence that CLECs would be able to obtain facilities from other companies that have "overbuilt" Qwest's network. Accordingly, Qwest's Petition should be dismissed.

F. Many Reported CLEC Lines are UNE-based Lines.

In its Petition and supporting affidavit Qwest contends that CLEC lines have grown significantly in the past four years.[15] However, as acknowledged by Qwest, this includes

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13 Qwest Petition at 9.

14 Qwest Petition at p. 27.

15 Teitzel Affidavit at 8.

providers who resell Qwest retail services or providers that use unbundled network elements purchased from Qwest, including UNE-P and UNE-loops which account for the majority of the CLEC lines.[16] McLeodUSA submits that the fact that competitors have been able to increase their number of lines is simply because they are able to obtain the bottleneck facilities controlled by Qwest under the specific terms of Sections 251 and 271. As long as Qwest continues to provide the facilities by which competitors provide service it will be able to exert market power by setting prices for underlying services, making technical decisions that affect the quality of service, and determining where facilities, and therefore service, will be provided. The Commission should therefore not give any serious weight to the statistics provided by Qwest.

Even if correct that new entrants are gaining a significant share of most new business, the time period in which this may have been happening is too brief to warrant any conclusions concerning Qwest's market power. Accordingly, the Commission should conclude that Qwest continues to possess the overwhelming share of the Omaha MSA.

G. Qwest Still Has Market Power Despite its Alleged Decline in Market Share

In its Petition Qwest goes out if its way trying to convince the Commission that given that it has allegedly lost significant market share in the Omaha MSA, Qwest no longer has market power in this market.[17] This argument is false. The Commission has already found that companies that have a small market share may still have market power in certain services.[18] In the instant case, even taking Qwest's statistics at face value, Qwest still possesses significant

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16 *Id.*

17 Qwest Petition at 20.

18 *See Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, 16 FCC Rcd 9923 (2001) (holding that CLECs have market power in access services, even though CLECs have a small market share).

market power in both the retail and wholesale markets in the Omaha MSA and as such, the relief requested by Qwest should be denied.

IV. QWEST HAS FAILED TO MEET THE STANDARD FOR FORBEARANCE

In order to forbear, the Commission, pursuant to the requirements of Section 10(a), must determine that: i) "enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory;" ii) "enforcement of such regulation or provision is not necessary for the protection of consumers;" and iii) "forbearance from applying such provision or regulation is consistent with the public interest."[19] The Commission must also determine whether forbearance will promote competitive market conditions and enhance competition among providers of telecommunications service.[20] Since the proposed forbearance would involve requirements of Sections 251(c) and 271, Section 10(d) requires that the Commission must also determine that the requirements of Sections 251(c) and 271 have been "fully implemented."[21] Even a cursory application of Section 10's standards demonstrates that Qwest's Petition should be dismissed.

A. Qwest's Petition Does Not Meet the Requirements of Section 10(a)

As noted above, a duopoly is not sufficient justification to grant Qwest's Petition and does not meet the requirements of Section 10(a). McLeodUSA submits that the Commission could not make these findings in this case. Qwest has not shown that it lacks market power in provision of wholesale access to end users that would enable the Commission to rely on market forces, rather than regulation, to assure that competitors will have access to Qwest's bottleneck facilities upon reasonable terms and conditions. In addition, the Commission could not

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19 47 U.S.C. § 160(a).

20 47 U.S.C. § 160(b).

conclude that forbearance would be consistent with the public interest. Absent compliance with the market opening provisions of the Act, it would not be in the public interest to substantially deregulate incumbent LECs because there would be no assurance that they could not engage in conduct that would thwart competition, such as by denying competitors access to bottleneck facilities. Accordingly, the Commission must deny Qwest's request for forbearance.

B. The Petition is Premature as the Requirements of Sections 251(c) and 271 Have Not Been Fully Implemented

Qwest's claim that "[B]oth the FCC and the Nebraska Commission have previously determined that Qwest has *fully implemented* the requirements of Sections 251, 252 and 271 in the State of Nebraska,"[22] is not only premature but contrary to Congress' specific intent while drafting Section 10(d).

Section 10(d) clearly evidences a Congressional intent that forbearance in regard to Sections 251(c) and 271 provisions should not be entered into lightly. As the Commission has noted, the "fully implemented" language of Section 10(d) demonstrates that Congress considered Sections 251(c) and 271 to be a "cornerstone" of the 1996 Act.[23] While the term "fully implemented" is not defined in the Act, it is hard to imagine that the drafters would consider the Act to be fully implemented only eight years after the promulgation of the Act, with CLECs possessing a minority position in the Omaha MSA local market.

The Commission has already rejected Qwest's argument that Section 271 is "fully implemented" because Qwest has obtained Section 271 authority in the State of Nebraska. In its recent decision denying Verizon's Petition for forbearance from the requirements of Section 271

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21 47 U.S.C. § 160(d).

22 Qwest's Petition at 30 (emphasis added).

23 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24,012, ¶ 73 (1998).

the Commission held that "the grant of Section 271 authority in a state does not mean that all the requirements of Section 271 (much less the requirements of Section 251(c)) have been fully implemented".[24] Moreover, the Commission has found that "obtaining Section 271 authorization is not the end of the road and that the "critically important power in Section 271(d)(6) "underscores Congress' concern that BOCs continue to comply with the statute."[25]

The Commission previously declined to forbear from Section 271 requirements in regard to advanced services finding that "Congress did not provide us with the statutory authority to forbear from these critical market-opening provisions of the Act until their requirements have been fully implemented."[26] With competition still limited in the Omaha MSA, Section 271 is far from being "fully implemented." For this reason alone, Qwest's Petition should be denied.

Moreover, the objectives and purposes of the Act suggest that the requirements of Section 251(c) and 271 will be "fully implemented" in the Omaha MSA, when there is ubiquitous availability of cost-based alternatives to Qwest's bottleneck facilities.[27]

Finally, the requirements of Sections 251(c) and 271 will not be "fully implemented" until the Commission issues final and unchallenged rules that implement the duties and obligations of section 251(c) in its upcoming *Triennial Review Order Remand Proceeding* and these rules are in fact carried into effect in the Omaha MSA.

C. This Proceeding is Not the Proper Forum to Address UNE issues.

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[24] *See Petition from Verizon for Forbearance from the Prohibition of Sharing Operating, Installation and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, Memorandum Opinion and Order, CC Docket 96-149 (rel. November 4, 2003), at ¶¶ 6-7.

[25] *Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In Region, InterLata Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd. 3953 ¶¶ 448-453 (1999).

[26] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188, ¶ 11 (1998).

[27] *See Verizon v. FCC*, 535 U.S. at 532, 538.

The proper forum for Qwest's request for relief is the Commission's *Triennial Review Order Remand Proceeding* (the proceeding that it established to review UNE issues in the first place), where the Commission can address Qwest's unbundling requirements, such as those for specific transport routes and loop locations in the Omaha MSA. This forum provides a vehicle for the Commission to review access to UNEs issues without the unnecessary, duplicative, and burdensome filings these forbearance petitions represent.

V. CONCLUSION

For the foregoing reasons, the Commission should deny Qwest's Petition for Forbearance.

Respectfully submitted,

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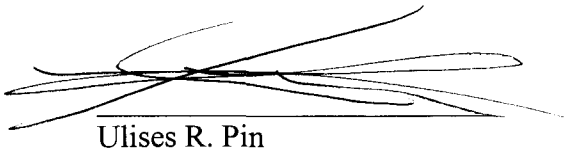
Dated: August 24, 2004

CERTIFICATE OF SERVICE

I, Ulises R. Pin, hereby certify that on August 24, 2004, I caused to be served upon the following individuals the Comments of McLeodUSA Telecommunications Services, Inc., on Qwest's Petition for Forbearance in the Omaha Metropolitan Statistical Area in CC Docket No. 04-223.



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